

Responding to state Supreme Court ruling, DNREC again must adopt interim emergency sediment and stormwater regulations

DOVER – The Department of Natural Resources and Environmental Control has adopted interim emergency sediment and stormwater management regulations – in effect reinstating the 2014 regulations invalidated today by Delaware’s Supreme Court, with the high court’s opinion upholding a Superior Court decision issued last fall. DNREC’s action today also adopts supporting technical materials as interim regulations, consistent with the Court’s ruling.

The technical materials for Delaware’s sediment and stormwater regulations include design and construction standards and specifications intended to assist in complying with the regulations. This action by DNREC will allow development projects to move forward through the review and approval process, which was established for reducing potential impacts from flooding and protecting public health, safety and welfare.

Neither of the two courts’ opinions provided specific guidance on how DNREC should review plans in the absence of a regulatory standard. Following the Superior Court’s decision last fall, DNREC adopted the 2014 regulations and technical documents through emergency action, until a stay was issued by the Superior Court. DNREC is following the same path today in order to allow projects currently under review to continue toward approval.

"We are obviously disappointed with the Court's opinion, and are compelled to adopt emergency regulations to maintain certainty of the process, enabling us to continue to review and approve plans and allow landowners, developers, contractors and homeowners to maintain schedules and commitments to customers, lenders, agencies and others involved in these important projects," said DNREC Secretary David Small. "Engineers, system designers and developers have repeatedly expressed their desire to see flexible standards that can be amended quickly if newer, cheaper and more efficient best practices are identified. Unfortunately this ruling will prevent those changes from happening more quickly, as they will have to go through the regulatory process, which may take many months to complete."

Although some have argued that DNREC should revert to previous versions of the regulations, the Supreme Court's opinion was silent on the matter, as was the earlier ruling by Superior Court. However, many projects submitted under the 2014 regulations would not meet standards under the previous 2006 version of the regulation and would need to be redesigned. In addition, prior regulations were implemented in conjunction with supporting technical materials, a practice criticized by the Superior Court in its original opinion last October.

The interim regulations, adopted under the state's Administrative Procedures Act, will be in effect for 120 days and may be extended for an additional 60 days. During the effective period of the emergency regulations, DNREC will continue to work with the Regulatory Advisory Committee, which DNREC convened late last year, on changes to the sediment and stormwater regulations and technical standards. Any changes will be subject to public hearing under the state's Administrative Procedures Act.

"We remain committed to a thorough, open and rigorous review of the regulation and technical standards," said Secretary Small. "We have already made good progress with the Committee

in identifying measures that can bring additional flexibility to stormwater management and I remain optimistic that, working together, we can find solutions that protect our precious water resources and at the same time address the concerns of other agencies, local government and the development community.”

Delaware’s sediment and stormwater management regulations are a vital tool in the state’s efforts to improve water quality and protect public health, safety and property from flooding. Under federal law, Delaware is required to have a valid erosion and sedimentation program in place for all construction activities, and Delaware’s erosion and sedimentation program must have enforceable regulations in place to be valid.

The Delaware stormwater management program was adopted in response to specific policy findings enacted into law;:“The General Assembly further finds that accelerated stormwater runoff increases flood flows and velocities, contributes to erosion, sedimentation, and degradation of water quality, overtaxes the carrying capacity of streams and storm sewers, greatly increases the costs of public facilities in carrying and controlling stormwater, undermines flood plain management and flood control efforts in downstream communities, reduces groundwater recharge, and threatens public health, welfare, and safety.”

The order adopting interim stormwater and sediment regulations can be found on the DNREC website at dnrec.delaware.gov/Info/Pages/SecOrders_Regulations.aspx

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